

REMARKS

Claims 1-22 are pending with claim 1 being independent.

Claims 1-15 and 19-22 have been rejected as being unpatentable over United States Patent No. 5,960,409 (“Wexler”) in view of United States Patent No. 5,794,210 (“Goldhaber”). Claims 16-18 have been rejected as being unpatentable over Wexler in view of Goldhaber and United States Patent No. 5,937,162 (“Funk”). Applicants respectfully request reconsideration and withdrawal of the rejections in view of the following remarks.

Wexler issued on September 28, 1999 from an application that was filed on October 11, 1996. Since Wexler issued after the October 29, 1996 U.S. priority date of the present application, it does not qualify as prior art under sections 102(a) and (b). Moreover, since, as discussed below, applicants have established a reduction to practice prior to April 26, 1996 (before Wexler’s U.S. priority date), Wexler does not qualify as prior art under section 102(e).

In a previous response dated May 21, 2008, applicants submitted affidavits of Dwight Merriman and Kevin O’Connor establishing a reduction to practice of the invention of claims 1-22 prior to April 26, 1996. In response, the office action stated that the affidavits were ineffective to overcome Wexler because they were “insufficient to establish diligence from a prior date to the date of reduction to practice.” The Office Action applied the incorrect standard in considering the previously-submitted affidavits because diligence is not relevant where a reduction to practice before the effective date of the reference is established.

Specifically, 37 C.F.R. 1.131(b) states that “the showing of facts shall be such, in character and weight, as to establish reduction to practice prior to the effective date of the reference, or conception of the invention prior to the effective date of the reference coupled with due diligence from prior to said date to a subsequent reduction to practice or to the filing of the application.” Thus, it is clear that a showing of diligence is required only where a prior conception date is being relied upon. In the instant application, applicants have provided evidence of a reduction to practice before the October 11, 1996 filing date of Wexler. Accordingly, applicants request withdrawal of the current rejections at least because they improperly rely on Wexler.

Applicant : Dwight Allen Merriman et al.
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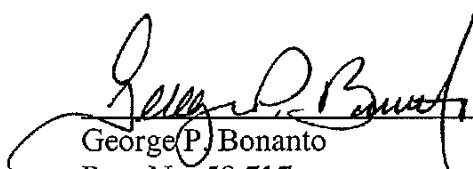
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Applicants note that other reasons for patentability of claims 1-22 may exist, and that applicants' reliance on the earlier reduction to practice of the claimed subject matter is not an agreement that claims 1-22 are rendered obvious by the proposed combinations set forth in the office action, or by any other combination of Wexler, Goldhaber and Funk.

If the Examiner has any questions regarding this document, applicants asks that the Examiner contact applicants' undersigned attorney.

Payment for the fee for a two-month extension of time is made by deposit account authorization on the Electronic Filing System. Please apply any other charges or credits to deposit account 06-1050.

Respectfully submitted,



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